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IN THE  
**SUPREME COURT OF THE UNITED STATES**

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OCTOBER TERM, 1978

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No. 78-110

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SHEARN MOODY, JR.,  
Petitioner,

vs.

STATE OF ALABAMA, ex rel. CHARLES H. PAYNE, Commissioner of  
Insurance and Receiver of EMPIRE LIFE INSURANCE COMPANY OF  
AMERICA, and PROTECTIVE LIFE INSURANCE COMPANY,  
an Alabama Corporation,  
Respondents.

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**BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI  
To the Supreme Court of Alabama**

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## TABLE OF CONTENTS

	Page
Introduction .....	1
Statement of the Case .....	4
Argument .....	6
Conclusion .....	11
Proof of Service .....	11

### Cases

Allmon v. Bookout, et al., No. 74-377-N (M.D. Ala. 1974); No. 75-2104 (5th Cir.) .....	4, 5, 6, 7
Day v. State, 489 S.W.2d 368 (Tex. Civ. App.—Austin 1972, n.r.e.) .....	2
Donovan v. City of Dallas, 377 U.S. 408 (1964) .....	6, 8
Durley v. Mayo, 351 U.S. 277 (1956) .....	10
Ex Parte Shearn Moody, Jr., 351 So.2d 538 (S. Ct. Ala. 1977) .....	2
Empire Life Ins. Co. v. State, 492 S.W.2d 366 (Tex. Civ. App.—Austin 1973) .....	2
Honeyman v. Hanan, 300 U.S. 14 (1937) .....	10
Johnson v. Brown-Service Ins. Co., 293 Ala. 549, 307 So. 2d 518 (1974) .....	8
Laird v. Tatum, 408 U.S. 1, 15, 92 S. Ct. 1318, 33 L. Ed. 2d 165 (1962) .....	7

Lightsey v. Kensington Mortgage and Finance Corp., 294 Ala. 281, 315 So.2d 431 (1975) .....	5
Lynch v. New York ex rel. Pierson, 293 U.S. 52 (1934) .....	10
Moody v. Crook, 520 S.W.2d 958 (Tex. Civ. App.—Austin 1975) .....	2
Moody v. Jones, 519 S.W.2d 536 (Tex. Civ. App.—Austin 1975) .....	2
Moody v. Moody Nat'l Bank, 522 S.W.2d 710 (Tex. Civ. App.—Houston 1975, n.r.e.) .....	2
Moody v. State, 529 S.W.2d 452 (Tex. Civ. App.—Austin 1975) .....	2
Moody v. State, ex rel. Payne, 295 Ala. 299, 329 So.2d 73 (1976) .....	2, 3, 4, 9
Moody v. State, ex rel. Payne, 344 So.2d 160 (1977) ....	2
Moody v. State ex rel. Payne, 351 So.2d 547 (S. Ct. Ala. 1977) .....	2
Moody v. State ex rel. Payne, 351 So.2d 552 (S. Ct. Ala. 1977) .....	2
Moody v. State ex rel. Payne, 355 So.2d 1116 (S. Ct. Ala. 1978) .....	2, 5
Moody v. Texas, 538 S.W.2d 158 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e. 1977) .....	2
Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 166, 92 S. Ct. 1965, 32 L. Ed. 2d 627 (1965) .....	7
Walker v. City of Birmingham, 388 U.S. 307 (1967) ....	10
Williams v. Kizer, 323 U.S. 471 (1945) .....	10

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**INTRODUCTION**

The Petition before this Court is the most recent in a series of attempts by Shearn Moody, Jr., to secure piecemeal review in this Court of the domiciliary receivership proceedings, involving Empire Life Insurance Company of America ("Empire"), conducted by the Alabama trial court. Petitioner ("Moody") was the chief executive officer and principal stockholder of

Empire, an insolvent Alabama insurance company. Respondents are Protective Life Insurance Company ("Protective"), the Alabama insurance company that reinsured Empire's policies during the course of the receivership proceedings, and the Commissioner of Insurance of the State of Alabama, the Empire Receiver.

The decision of the Supreme Court of Alabama which is sought to be reviewed is *Moody v. State ex rel. Payne*, 355 So. 2d 1116 (S. Ct. Ala. 1978). Citations of some of the other reported decisions in this litigation are listed below:

- Moody v. State ex rel. Payne*, 351 So. 2d 552 (S. Ct. Ala. 1977);
- Moody v. State ex rel. Payne*, 351 So. 2d 547 (S. Ct. Ala. 1977);
- Ex Parte Shearn Moody, Jr.*, 351 So. 2d 538 (S. Ct. Ala. 1977);
- Moody v. State, ex rel. Payne*, 344 So. 2d 160 (1977);
- Moody v. State, ex rel. Payne*, 295 Ala. 299, 329 So. 2d 73 (1976);
- Moody v. State*, 529 S.W.2d 452 (Tex. Civ. App.—Austin 1975);
- Empire Life Ins. Co. v. State*, 492 S.W.2d 366 (Tex. Civ. App.—Austin 1973);
- Moody v. Crook*, 520 S.W.2d 958 (Tex. Civ. App.—Austin 1975);
- Moody v. Jones*, 519 S.W.2d 536 (Tex. Civ. App.—Austin 1975);
- Day v. State*, 489 S.W.2d 368 (Tex. Civ. App.—Austin 1972, n.r.e.\*);
- Moody v. Moody Nat'l Bank*, 522 S.W.2d 710 (Tex. Civ. App.—Houston 1975, n.r.e.);
- Moody v. Texas*, 538 S.W.2d 158 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e. 1977).

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\* Indicates denial of review by the Texas Supreme Court upon a finding of "no reversible error" (n.r.e.).

This Court has, to date, denied five of Moody's petitions for certiorari relating to the Empire receivership proceedings.<sup>1</sup> The Petition now before this Court seeks review of certain money judgments entered against Moody by the Alabama receivership court in the wake of a civil-contempt adjudication that was entered by the Alabama receivership court on April 30, 1975. No ordinary appellate review in the Supreme Court of Alabama was sought by Moody from the civil-contempt adjudication, and this Court denied Moody's petition for writ of certiorari challenging the contempt adjudication in Case No. 76-1845.<sup>2</sup> The civil-contempt adjudication was based upon Moody's violation of an injunction entered by the Alabama receivership court on January 6, 1975. Moody appealed the injunction to the Supreme Court of Alabama *Moody v. State Ex Rel. Payne*, 295 Ala. 299, 329 So. 2d 73 (1976). That Court affirmed, holding that "[t]he injunction [against Moody] was not only justified but was necessary to preserve the assets of Empire." 295 Ala. at 306, 329 So. 2d at 79. Moody sought no timely review in this Court of the decision of the Alabama Supreme Court affirming the January 6, 1975 injunction. Moody did, however, unsuccessfully attempt a collateral attack upon the injunction by petition for certiorari filed in this Court in Case No. 77-1041.<sup>3</sup>

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<sup>1</sup> Petitions have been denied in *Ex parte Shearn Moody, Jr.*, No. 76-1845, cert. denied 10/3/77, reh. denied 11/28/77; *Shearn Moody, Jr. v. Texas*, No. 77-571, cert. denied 12/5/77, reh. denied 1/16/78; *Shearn Moody, Jr. v. State of Alabama, ex rel. Payne*, No. 77-428, cert. denied 12/12/77; *Shearn Moody, Jr. et al. v. Texas*, No. 77-873, cert. denied 2/21/78; *Shearn Moody, Jr. v. State of Alabama ex rel. Payne*, No. 77-1109, cert. denied 4/17/78; *Ex Parte Shearn Moody, Jr.*, No. 77-1041, cert. denied 4/17/78.

<sup>2</sup> *Ex parte Shearn Moody, Jr.*, No. 76-1845, cert. denied October 3, 1977, reh. denied November 28, 1977.

<sup>3</sup> *Ex Parte Shearn Moody, Jr.*, No. 77-1041, cert. denied April 17, 1978.

### STATEMENT OF THE CASE

The injunction which the Petition attacks was entered by the Alabama receivership court on January 6, 1975. The injunction prohibited Moody from filing any lawsuit or amended complaints against the Empire Receiver or Protective, without first obtaining the receivership court's approval. Simply stated, the injunction prohibited Moody from interfering with the receivership estate and the receivership proceedings. (The injunction is appended to Pet. before this Court as Exh. D). After the injunction had been entered against him, Moody petitioned the Alabama Supreme Court to issue extraordinary writs of mandamus and prohibitions declaring the receivership court's injunction invalid. The Alabama Supreme Court denied extraordinary relief (S. Ct. Ala. No. 1125). Moody applied for, and was refused, rehearing (*id.*). Moody then perfected an appeal from the injunction (Ala. S. Ct. 1969), and the Alabama Supreme Court affirmed. *Moody v. State Ex Rel. Payne*, 295 Ala. 299, 329 So. 2d 73 (1976). No timely review of the affirmance of the injunction by the Alabama Supreme Court was sought in this Court.

During the pendency of Moody's appeal to the Alabama Supreme Court challenging the validity of the receivership court's injunction against him, an amended complaint was filed by Moody's lawyers in the case of *Allmon v. Bookout*.<sup>4</sup> The *Allmon* amended complaint sought to nullify every single order of the receivership court from the time that receivership proceedings were instituted against Empire in 1972 (R. 165-66). Immediately after the amended complaint was filed, Protective

<sup>4</sup> *Allmon v. Bookout, et al.*, No. 74-377-N (M.D. Ala. 1974); No. 75-2104 (5th Cir.) Though Moody solicited an Empire policyholder to file the *Allmon* lawsuit, Moody was neither an Empire policyholder himself, nor was Moody an actual party to the *Allmon* suit. *Moody v. State*, 295 Ala. at 303, 308 (1976); See also R. 92-110.

petitioned the receivership court for a show-cause order and civil-contempt adjudication against Moody. After an evidentiary hearing, Moody was adjudicated in civil-contempt by order entered April 30, 1975. The contempt adjudication specified what actions were required of Moody to purge himself of contempt. In the meanwhile, determination of the amount of damages sustained by Protective and the Empire Receiver as a result of Moody's contempt was postponed.

On August 19, 1976, after the *Allmon* action had been dismissed as moot on the grounds that Allmon had voluntarily surrendered his Empire policy and, at any rate, had not in any way been injured by the receivership proceedings, Protective filed a claim in the receivership proceeding for compensatory and exemplary damages against Moody.<sup>5</sup> Thereafter, a trial was conducted to determine the amount of Protective's damages resulting from Moody's contempt, *i.e.*, Moody's sponsorship of the *Allmon* action in open violation of the January 6, 1975 injunction of the receivership court. At the conclusion of the damage hearing, the receivership court entered extensive findings of fact and conclusions of law (R. 76-84, appended to Pet. before this Court as Exh. I). On Moody's appeal from the damage judgment, the Supreme Court of Alabama reduced the amount of the judgment in favor of Protective to \$165,228.50. The judgment, as corrected, was affirmed and rendered. The instant petition for a writ of certiorari in this Court ensued.

The sole issue presented by the Petition now before this Court is whether the money judgments sought to be reviewed are invalid under the case of *Donovan v. City of Dallas*, 377 U.S. 408 (1964).

<sup>5</sup> It is authorized under Alabama law to have damages resulting from civil contempt determined in an ancillary proceeding conducted in the case out of which the contempt arose. *Lightsey v. Kensington Mortgage and Finance Corp.*, 294 Ala. 281, 315 So. 2d 431 (1975), this procedure was reaffirmed by the decision of the Supreme Court of Alabama which is sought to be reviewed by the instant Petition. *Moody v. State ex rel. Payne*, 355 So. 2d 1116 (S. Ct. Ala. 1978).

## ARGUMENT

The undisputed facts can be succinctly summarized. Moody was enjoined in January 1975 by the receivership court from participating in the filing of an amended complaint in the *Allmon* lawsuit, without first securing the approval of the receivership court. Shortly thereafter, Moody participated in the filing of such an amendment, which sought, *inter alia*, to nullify every order entered by the receivership court in the Empire receivership proceedings. Moody never sought the approval of the receivership court prior to filing the amended complaint. In April 1975, Moody was held in civil-contempt for having violated the injunction, and, after a damage hearing conducted by the Alabama receivership court in accordance with established procedure, money judgments were entered against him. The money judgments, after slight reduction in amount, were affirmed and rendered by the Supreme Court of Alabama, and the instant Petition was thereafter filed in this Court.

Moody contends that the petition for a writ of certiorari should be granted because the damage judgments sought to be reviewed are based upon a civil-contempt judgment that, in turn, is based upon a violation of an injunction that is invalid under the supremacy clause of the Constitution and the decision of this Court in *Donovan v. City of Dallas*, 377 U.S. 408 (1964).

For five compelling, independently sufficient reasons, the Petition should be denied. First, the Petition does not, and Moody cannot, show that he was deprived of any federal right, privilege or immunity. The Petition baldly asserts that “[a]s in the *Donovan* case, the petitioner herein was cited and adjudicated in civil-contempt . . . for attempting to exercise his federally guaranteed rights by participating in the *Allmon in personam* federal court actions . . .” (Pet. at 13). This is a false and sham issue, for Moody was neither a party litigant in the *Allmon* action, nor a member of the class of persons—Empire policy-

holders—ostensibly represented in the *Allmon* case.<sup>6</sup> It is well settled that one party will not be allowed to assert in this Court the constitutional rights of another. *See Laird v. Tatum*, 408 U.S. 1, 15, 92 S. Ct. 1318, 33 L. Ed. 2d 165 (1962); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166, 92 S. Ct. 1965, 32 L. Ed. 2d 627 (1965). Accordingly, Moody’s attempt in this case to assert purported federally secured rights of the litigants in the *Allmon* case or alleged rights of Empire policyholders is to be rejected. As no other deprivation is claimed by Moody, the conclusion is inescapable that there is no jurisdictional basis for review by this Court, and the Petition should therefore be denied.

Second, the only issue presented by Moody’s current petition was conclusively decided against him by the Supreme Court of Alabama, years ago, and Moody sought no timely review of that adverse decision in this Court. It appears on the face of the receivership-court injunction that Moody was restrained from participating in the filing of the *Allmon* amended complaint “unless . . . Shearn Moody, Jr., . . . shall first receive the prior approval of this Court.” (The injunction is appended to the Pet. before this Court as Exh. D). Moody never sought the approval of the receivership court prior to the filing of the *Allmon* amended complaint, and he never sought to have the injunction dissolved or modified. Rather, Moody appealed the injunction to the Supreme Court of Alabama in 1975. There, he made exactly the argument he now urges this Court to adopt, namely that the receivership court’s injunction violates the rule of *Donovan v. City of Dallas*, *supra*. In its decision reported in February 1976, the Supreme Court of Alabama rejected Moody’s argument:

“Most of [Moody’s] brief and most of his oral argument were devoted to the proposition stated in *Donovan v. City of Dallas*, 377 U.S. 408, 84 S. Ct. 1579, 12 L. Ed. 2d

<sup>6</sup> See note 4, *supra*.

409 (1964), that 'state courts are completely without power to restrain federal-court proceedings in *in personam* actions.' This principle is not new to us. *Donovan* was cited and applied by this court in *Johnson v. Brown-Service Ins. Co.*, 293 Ala. 549, 307 So. 2d 518 (1974).

"Moody made this argument in trying to show that the filing of the case of *Allmon v. Bookout* was not in violation of the injunction issued by [the receivership court].

"It is interesting to note that the same paragraph in which the previous quote [from *Donovan*] appears begins with some careful writing and limitation by Justice Black, the author of the opinion:

'Early in the history of our country a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings. That rule has continued substantially unchanged to this time. An exception has been made in cases where a court has custody of property, that is, proceedings *in rem* or *quasi in rem*. In such cases this Court has said that the state or federal court having custody of such property has exclusive jurisdiction to proceed. *Princess Lida v. Thompson*, 305 U.S. 456, 465-468, 59 S. Ct. 275, 280, 281, 83 L. Ed. 285. In *Princess Lida* this Court said "where the judgment sought is strictly *in personam*, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as *res judicata* in the other." [citations omitted].

"We have already shown that these suits [sponsored by Moody] were repeated attempts to remove assets from the *res* of the receivership and liquidation proceedings. The

federal courts have consistently followed the rule that proceedings involving the liquidation of the business and assets of an insurance corporation are *in rem* or *quasi in rem* proceedings. *Penn General Casualty Co. v. Pennsylvania*, 294 U.S. 189, 194-95, 55 S. Ct. 386, 388, 79 L. Ed. 850, 854-55; *Jacobs v. DeShetter*, 465 F. 2d 840 (6th Cir.); *Gillis v. Keystone Mut. Casualty Co.*, 172 F. 2d 826, 829 (6th Cir.), *cert. denied*, 338 U.S. 822, 70 S. Ct. 67, 94 L. Ed. 499; *Holley v. General American Life Ins. Co.*, 101 F. 2d 172 (8th Cir.), *cert. denied*, 307 U.S. 615, 59 S. Ct. 1038, 83 L. Ed. 1496; *Liberty National Ins. Co. v. Reinsurance Agency, Inc.*, 307 F. 2d 164, 168 (9th Cir.); *Hutchins v. Pacific Mut. Life Ins. Co.*, 20 F. Supp. 150, 152 (S.D. Cal.), *Aff'd*, 97 F. 2d 58, 60 (9th Cir.).

"We are convinced that [the receivership court] did not violate either the letter or the spirit of *Donovan*."

*Moody v. State ex rel. Payne*, 295 Ala. 299, 307-08 (1976). Moody sought no timely review by this Court of the 1976 decision of the Alabama Supreme Court rejecting his claim that the receivership injunction violated the *Donovan* principle. Yet the Petition now before this Court does not even acknowledge that the only issue presented by it was decided against Moody over two years ago. For the independent reason that the purported federal question presented by the instant Petition could only have been, but was not, presented by Moody after the 1976 decision of the Alabama Supreme Court, the instant Petition is due to be denied.

Third, as the reported decision of the Alabama Supreme Court in 1976 amply demonstrates, Moody's claim that the receivership court's injunction is contrary to *Donovan*, is totally without merit. *See Moody v. State ex rel. Payne*, 295 Ala. 299, 329 So. 2d 73 (1976). For this independent reason, the Peti-

tion is due to be denied because the Supreme Court of Alabama correctly decided the issue on the merits in 1976.

Fourth, petitioner has not demonstrated and, in fact, cannot demonstrate that the federal question he seeks to have reviewed by this Court was timely preserved in his appeal from the money judgments affirmed by the Supreme Court of Alabama. This Court has made it particularly clear that no jurisdiction to exercise review by certiorari exists unless the record affirmatively shows that the federal question was presented to the highest state court having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. *See, e.g., Durley v. Mayo*, 351 U.S. 277 (1956); *Williams v. Kizer*, 323 U.S. 471 (1945); *Honeyman v. Hanan*, 300 U.S. 14 (1937); *Lynch v. New York ex rel. Pierson*, 293 U.S. 52 (1934). No suggestion was made in Moody's appeal to the Alabama Supreme Court from the money judgments sought to be reviewed by the instant Petition that the judgments were invalid under *Donovan*. Because of Moody's conspicuous failure to satisfy the fundamental jurisdictional requirement that the federal question sought to be reviewed was preserved in the highest State court below, the Petition is due to be summarily denied.

Fifth, even if it be assumed, *arguendo*, that the receivership court's injunction was invalid under *Donovan* and that the Alabama Supreme Court erroneously decided this issue in 1976, Moody cannot thereby escape his liability for contempt after disobeying the injunction. *Cf. Walker v. City of Birmingham*, 388 U.S. 307 (1967). Accordingly, the money judgments that establish the amount of Moody's liability present no occasion for granting the instant Petition.

## CONCLUSION

Based on the foregoing authorities and analysis, the petition for writ of certiorari is due to be denied. It appears to a certainty that there is no ground for granting such a writ.

Respectfully submitted,

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## Proof of Service

Proof of service of three copies of Respondent's Brief in Opposition to Petition for a Writ of Certiorari upon all parties separately represented by counsel was filed by William A. Robinson, a member of the bar of the United States Supreme Court, with the Clerk of the United States Supreme Court on the same date the brief in opposition was filed.